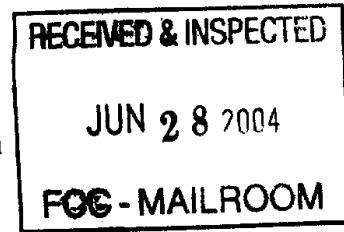


Before the
Federal Communications Commission
Washington, D.C. 20554



In re Application of)	MM DOCKET NO. 86-440
)	
Charlottesville Broadcasting Corporation)	Facility ID #363, Call Sign WCAV
For Voluntary Assignment)	
Of the Construction Permit)	
For A New TV Station on Channel 19)	
At Charlottesville, Virginia)	File No. BAPCT-20040316AJT
To Gray Television Licensee, Inc.)	

Application for Review

June 24, 2004

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th St. S.W.
Washington DC 20554

Re: MM Docket 86-440, and application for consent to assignment of broadcast station construction permit or license BAPCT – 20040316AJT

Dear Ms. Dortch:

On April 7, I submitted an informal protest, regarding the application of the Charlottesville Broadcasting Corporation ("CBC"), accepted for filing on March 26, 2004, to transfer control of facility #363, Call Sign WCAV, a construction permit, and its associated, then pending modification of construction permit application, for a new

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Television station at Charlottesville, Virginia, to Gray Television Licensee, Incorporated (“Gray”).

This transfer of control was granted on May 28, 2004, concurrent with the approval of the most current application for modification of this construction permit. I hereby submit a request for review of this decision, based upon an omission in both the original and “corrected” version of the untitled statement addressed to the Applicants and Objectors, issued under the signature of Barbara A. Kreisman, Chief, Video Division, Media Bureau, dated May 28, 2004.

1. The treatment of this application by the Federal Communications Commission (“the Commission”) is significantly different from that afforded to a previously considered and similarly situated party, in comparable circumstances. Similarly situated parties must be treated alike.¹ When disparate treatment of similarly situated parties is shown, an agency must provide a rational basis for its decision.² If such a reasoned analysis is provided, however, an agency is entitled to change its policy.³ The Commission (or, rather, the Commission’s staff) has not, in this statement, provided such a rational basis and analysis, as to why the treatment of this application for transfer was so different than that afforded to the application for assignment of construction permit, File No. BAP-20001221AAG, facility ID # 90157, WIJR(AM),

¹ *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730 (D. C. Cir. 1965).

² *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976),

³ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D. C. Cir. 1970) cert. Denied 403 U.S. 923 (1971) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”)

from Leo Kesselman d/b/a Palm Beach Gardens Radio (“Kesselman”), to Birach Broadcasting Corporation (“Birach”) (“the WIJR application”).

The WIJR application was, similarly to the WCAV application, submitted with only a short period of time remaining to construct. In the case of WIJR, the application was accepted on January 3, 2001. The WIJR construction permit, which had already been extended to three years subsequent to the change in the rules that occurred on November 25, 1998,⁴ was scheduled to expire on March 9, 2001. Therefore, at the time of application, there remained only 65 days to construct WIJR. The WIJR application was unopposed, and the Commission found no fault with the application. Despite this, the Commission delayed the grant of the transfer of control until March 1, 2001, leaving Birach only a mere eight days to consummate the transfer of control, construct WIJR, and apply for a license.

The Commission, on January 29, 2003,⁵ denied Birach’s Application for Review of the related request for waiver of the construction period rule. In this Memorandum Opinion and Order, the Commission justified its treatment of this application, and its related requests for tolling and review, on the following rational basis:

“7. The present case illustrates a practice that the Commission sought to end by adopting the new construction rules. Specifically, under our prior extension procedures,

⁴ 1998 Biennial Regulatory Review, *Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23092 (1998)(“Streamlining R&O”) *aff’d* Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540 (1999)(Streamlining MO&O”).

⁵ *Memorandum Opinion and Order*, FCC 03-14, adopted January 29, 2003

a number of permittees failed to diligently complete station construction. This approach to extension requests unnecessarily tied up limited spectrum and deprived the public of service. Here, Kesselman failed to secure a new site, did little during the construction period other than to market the permit, and brought its site problems to the staff's attention shortly prior to the permit's expiration. Birach acquired the permit one day prior to expiration, knowing that the authorized site was unavailable. This is precisely the sort of nonfeasance that the new construction requirements are designed to eliminate."

Rupp's Insurance & Risk Management Glossary defines "nonfeasance" as "Failure to perform, or complete neglect of, a required legal or contractual duty." With respect to WIJR, the Commission delayed the ownership transfer, and denied a waiver of the construction period rule. This resulted in forcing the expiration, unbuilt, of the construction permit for WIJR. Clearly, therefore, the Commission's actions were taken in response to the failure of the original construction permit holder to proceed to construct WIJR, and the attempts to market the permit rather than construct the station.

The situations of WCAV and WIJR were intensely similar. Both the WCAV and WIJR construction permits had been granted from an original field of five mutually exclusive applications, in a comparative proceeding that had started in 1986. The proceedings in both cases, included, and had been delayed by, petitions to deny, reinstatement, settlement negotiations, coordination to prevent interference to other broadcast stations and multiple engineering amendments. In both cases, the holder of the permit had at the

time of application, and subsequently, been engaged in a full time career, and had their primary residence located far from the community of license. In both cases, the holder of the construction permit had submitted an integration statement, stating, under penalty of perjury, that the applicant (in the case of Ms. Polivy, President and sole voting principal of Achenar Broadcasting Company, “the sole voting principal”, would work full time as the General Manager of the station⁶. In both cases, at the time of application for transfer of control, the location specified in the construction permit was not available for use by the holder of the construction permit. In both cases, the applicant failed to advise the Commission of the loss of the site specified in its construction permit application, in violation of Section 1.65 of the rules,⁷ and brought its site problems to the staff’s attention shortly prior to the permit’s expiration⁸. And, most importantly, in both cases, the holder of the construction permit, upon receiving the grant of the construction permit, failed to proceed to construct in a timely manner, and instead, proceeded to attempt to market the permit rather than construct the station.

In the case of the WCAV application, however, and despite the presence of multiple petitions to deny, the Commission granted the transfer of control only nine weeks to the day from its acceptance, and only three days after having received an amendment to the application. While the Commission does not require a Public Notice for a minor amendment, the grant of the application only three days after the receipt of an amendment gives little, if any, time for review, either by the Commission or by those actively opposing the grant of the application, and indicates a significant, unexplained,

⁶ “*Amendment to the Application of Achenar Broadcasting Company*”, May 22, 1986.

⁷ See footnote 17 to *Memorandum Opinion and Order*, FCC 03-14.

⁸ See “*Request for Expedited Processing*” by CBC, dated April 19, 2004

and unjustified rush to grant the application. The Commission also hurriedly granted, on the same day, May 28, 2004, an out-of-date, and therefore currently faulty⁹, modification of construction permit, File No. BMPCT-20031219AAK, as modified, to relocate WCAV.

By these actions, the Commission has endorsed the sale of a construction permit for profit. The Commission's staff granted the transfer and necessary construction permit modification with an extremely short, but adequate (given sufficient resources), 79 days to construct, test, and apply for license.

Therefore, the treatment of the application for transfer of control of WCAV is obviously significantly different than the treatment accorded to WIJR, but the statement by Ms. Kreisman lacks the required adequate justification for such a significant change in policy by the Commission. Therefore I request that the Commission accept and act on this Application for Review, remanding this decision to require an adequate justification for this unequal treatment of similarly situated parties.

Sincerely yours,

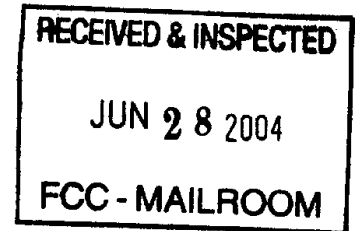
A handwritten signature in cursive script, reading "Sidney E. Shumate". The signature is written in dark ink and is positioned above a horizontal line.

Sidney E. Shumate

⁹ A separate issue, which will be dealt with in a separate petition for review of grant of the construction permit modification.

June 24, 2004

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th St. S.W.
Washington DC 20554



Re: MM Docket 86-440

Dear Ms. Dortch:

I, Sid Shumate, owner of a residence located at 432 Moseley Drive, in Charlottesville, Virginia, and owner of the Givens & Bell division of Blue Ridge Video Services, hereby submit the enclosed Application for Review of the May 28, 2004 grant of a transfer of control, file # BAPCT-20040316AJT, of the construction permit, as modified, for WCAV, Charlottesville, VA.

I certify that I am mailing or hand-carrying true copies to the following interested parties:

Mr. Gene A. Bechtel, Esq.
Law Office of Gene Bechtel, P.C., Suite 600
1050 Seventeenth St., NW
Washington DC 20036

Gray Television Licensee, Inc.
1750 K. Street, NW
Suite 1200
Washington, DC 20006

Lauren A. Colby, Esq.
Law Office of Lauren A. Colby
10 East 4th St.
Frederick MD 21701

Vincent A. Pepper, Esq.
Womble Carlyle Sandridge & Rice
1401 Eye Street, NW, 7th Floor
Washington DC 20005

Ms. Katrina Renouf, Esq.
Renouf and Polivy
432 Sixteenth St., N.W.
Washington DC 20036

A handwritten signature in black ink that reads 'Sidney E. Shumate'.

Sidney E. Shumate
Principal Owner, Givens & Bell Division of Blue Ridge Video Services
1897 Ridge Road, Haymarket VA 20169